*250 Assethold Ltd v Mr N M Watts

Upper Tribunal (Lands Chamber)

8 December 2014

[2014] UKUT 0537 (LC)

[2015] L. & T.R. 15

(Martin Rodger QC , Deputy President)

8 December 2014

Costs; Covenants; Fees; Interim injunctions; Leases; Party walls; Repairs; Service charges;

H1 *Service charge provisions—Legal costs—Injunction Proceedings—Party Wall etc Act 1996—Notice by adjoining owner of intention to carry out works—Injunction by landlord to restrain commencement of works pending publication of party wall award—Landlord's legal costs of injunction proceedings—Whether recoverable from tenants by way of service charge—Whether injunction costs incurred in repair or maintenance of building—Whether provision for fees of the Surveyor and Accountant can include legal costs—Whether costs recoverable as being necessary or desirable for the proper maintenance, safety, amenity and administration of the property.*

Summary of decision

H2 On the true construction of the lease, legal costs incurred by a landlord in obtaining an injunction against an adjoining owner prohibiting works on a party wall structure before publication of a party wall award were recoverable from the tenant under a service charge provision that permitted the inclusion of costs for all matters as in the reasonable discretion of the landlord might be considered necessary or desirable for the proper maintenance, safety, amenity and administration of the property.

Parties

H3 *Appellant (claimant below)* : Assethold Ltd ("the landlord")

Respondent (defendant below) : N.M. Watts and others ("the tenants")

Facts

H4 The tenants held the leases of 13 flats in a block in London. Their leases contained provisions that required the landlord to perform or provide certain services listed in the First Schedule and for the tenants to pay a service charge equal to an agreed percentage of the landlord's annual expenditure on the services. The flank wall of the block was constructed on the boundary between two properties and in January 2011, F, the owner of the adjoining property, served on the landlord and the tenants under the Party Wall etc Act 1996 notices of its intention to carry out works on the boundary. Before the surveyors retained by the landlord and by F had published *251 a joint party wall award, F started works on the boundary and the landlord instructed solicitors who obtained an injunction to restrain the works until the award was published, which was in July 2011. On the landlord's application to discontinue the injunction proceedings, F was ordered to pay £40,000 on account of the landlord's costs and the landlord was ordered to pay some of F's costs. As part of the service charge for the year ending December 2011, the landlord demanded from the tenants a contribution towards the costs it had incurred in connection with the injunction proceedings. The landlord indicated that it would in subsequent years seek to recoup the further legal costs it had incurred in defending F's appeal against the party wall award. The tenants objected to the inclusion of these costs and the landlord applied to the Leasehold Valuation Tribunal under s.27A of the Landlord and Tenant Act 1985 for a declaration that the injunction costs were recoverable, contending that they fell within the landlord's obligations to maintain and keep in good repair the main structure of the block (First Schedule, para.1) or to do

all things as in its reasonable discretion were considered necessary or desirable for the proper maintenance, safety, amenity and administration of the development (First Schedule, para.6); alternatively that legal costs fell within “additional items” of expenditure, defined as the proper fees and disbursements (and VAT) of the Surveyor, the Accountant and any other individual firm employed or retained by the landlord for (or in connection with) such surveying or accounting functions or the management of the Development for the purposes of assessing the full cost of rebuilding and reinstatement and any individual firm providing caretaking or security arrangements and services to the Development (Second Schedule, para.6). The LVT held that although both the landlord's actions in responding to the party wall notice and (subject to certain deductions) the amount of its costs were reasonable, none of the provisions in the leases permitted the landlord to recover its legal costs by way of a service charge. The landlord appealed to the Upper Tribunal (Lands Chamber).

Held, allowing the appeal:

H5 1. The tenants’ contention that service charge provisions are generally to be construed restrictively and ambiguity is to be resolved against the landlord could not be supported in the light of the decisions of the Court of Appeal in *Arnold v Britton [2013] EWCA Civ 902* and *Francis v Philips [2014] EWCA Civ 1395* , which made it clear that there are no special rules for the construction of service charge provisions. Equally there is no general principle that expenditure on legal services can be recovered under general words in a lease that do not refer to such costs.

H6 2. Although the requirements “to maintain” and “to repair” connote different obligations, and the former includes a duty to prevent the subject of the covenant from falling out of its original condition, neither was engaged by F’s activities. Both expressions connote the doing of something to the subject matter of the covenant and neither is apt to describe a process or activity that is remote from the thing to be repaired or maintained. One could not properly speak of repairing or maintaining a building in good and substantial repair and condition by providing legal services at a distance, nor were such services incidental to repair or to maintaining that condition. As a matter of ordinary language, the risk against which maintenance is directed is a risk of deterioration through use, rather than injury or ****252*** damage caused by the exceptional activity of another. Further, by cl.4.3 the landlord covenanted affirmatively to perform the obligations contained in the First Schedule and it would be surprising if that included an obligation to commence proceedings against a neighbouring owner.

H7 3. Paragraph 6 of the Second Schedule was limited to the fees of the Surveyor and Accountant, or the persons performing the other three specific functions identified. Those functions are not apt to encompass legal services, especially in a lease in which some legal services were described in express terms elsewhere. In any event, litigation against a third party is not properly to be regarded as a “service”.

H8 4. However, the language of para.6 of the First Schedule was sufficiently clear to entitle the landlord to recoup the cost of engaging solicitors to take reasonable steps to ensure that the protection afforded to the block by a party wall award would not be lost: such steps could appropriately be described as having been taken for the proper maintenance, safety, amenity and administration of the Building. The structure of the block remained vested in the landlord and the service charge put it in a position to fund action for the common good which might be beyond the resources of individual tenants. The lease also permitted the recovery through the service charge of all sums reasonably and properly incurred in the abatement of a nuisance, which was consistent with that conclusion.

H9 5. Accordingly, the LVT was wrong to determine that the landlord’s expenditure on legal costs in obtaining the injunction was not capable of forming part of the service charge. However, this conclusion was not determinative of the recoverability of service charge expenditure in any other year, nor did it necessarily mean that the costs of resisting F’s appeal against the party wall award (by which time there was no longer any threat to the block) were recoverable.

Cases referred to:

Arnold v Britton [2013] EWCA Civ 902; [2013] L. & T.R. 24

Attorney General of Belize v Belize Telecom [2009] UKPC 10; [2009] 1 W.L.R. 1988

Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38; [2009] 1 A.C. 1101

Francis v Philips [2014] EWCA Civ 1395; [2015] L. & T.R. 4

Freetown Ltd v Assethold Ltd [2012] EWCA Civ 1657; [2013] 1 W.L.R. 701

Gilje v Charlegrove Securities [2001] EWCA Civ 1777; [2002] 1 E.G.L.R. 41

Greetings Oxford Koala Hotel Pty Ltd v Oxford Square Investments Ltd (1989) 18 NSWLR 33

Hamilton v National Coal Board [1960] A.C. 633; [1960] 2 W.L.R. 313

Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 W.L.R. 896

Iperion Investment Corp v Broadwalk House Residents Ltd [1995] 2 E.G.L.R. 47

McHale v Earl Cadogan [2010] EWCA Civ 14; [2010] 1 E.G.L.R. 51

Rainy Sky SA v Kookmin Bank [2011] UKSC 50; [2011] 1 W.L.R. 2900

Reston v Hudson [1990] 37 E.G. 86

Sella House Ltd v Mears (1989) 21 H.L.R. 147; [1989] 12 E.G. 67

St Mary's Mansions Ltd v Limegate Investment Co Ltd [2002] EWCA Civ 1491; [2003] 1 E.G.L.R. 41

***253**

Legislation referred to:

Landlord and Tenant Act 1985 s.27A

H12 For further details of the law in this area see *Woodfall's Law of Landlord and Tenant* , Vol.1, para.7.172.1: "Costs of proceedings between the landlord and third parties".

H13 **Representation**

Philip Sissons of counsel, instructed by Conway & Co , solicitors for the appellant.

Justin Bates of counsel, instructed by Blake Morgan , solicitors for the respondent.

Decision

Martin Rodger QC

Introduction

1 In this appeal against a decision of a Leasehold Valuation Tribunal of the London Rent Assessment Panel ("the LVT") made on 21 January 2013 the appellant landlord claims to be entitled to recover from the respondent tenants legal expenses incurred by the appellant in a dispute with the owner of neighbouring land over work to a party wall. The LVT made a determination under s.27A, Landlord and Tenant Act 1985 that the appellant was entitled to the costs of employing a surveyor in connection with the party wall dispute to the service charge payable by the respondents, the terms of the leases did not cover the costs of employing solicitors and counsel in the same dispute. With the permission of the Tribunal the appellant now challenges that decision.

2 The sums in issue before the LVT comprised solicitors' and counsels' fees of £55,600 and surveyors' fees of £4,188, all of which had been incurred in the year ending 31 December 2011. These amounts are only a relatively small proportion of the total sums at stake, because, as I will explain, the dispute between the appellant and its neighbour continued into subsequent service charge years through several further rounds of litigation.

3 At the hearing of the appeal the appellant was represented by Philip Sissons of counsel, instructed by Conway & Co, solicitors, while Justin Bates of counsel, instructed by Blake Morgan, solicitors, appeared for the respondents.

The facts

4 From the decision of the LVT, the primary documents and a helpful statement of facts agreed between the parties, I take the following facts as the basis of my decision in this appeal.

5 The appellant is the head leasehold owner of a modern block of 14 flats known as 4 Westport Street, London E1 which was constructed in about 2008 ("the Building"). The appellant's own lease is for a term of 999 years. The respondents are the leasehold owners of 13 of the flats in the Building, with the appellant as their immediate landlord. A full list of the respondents appears in the appendix to this decision. The leases of the flats were granted in or around 2009 each for a term of 125 years from 1 January 2008 and are in a standard form. ***254**

6 The land on which the Building stands adjoins other land at 12 Westport Street which at the beginning of 2011 was a cleared site awaiting development. The flank wall of the Building is constructed on the boundary between the two properties.

7 On 20 January 2011, Freetown Ltd, the owner of 12 Westport Street, served notices on the appellant under ss.2 and 6 of the Party Wall etc Act 1996 ("the 1996 Act") informing it of Freetown's intention to exercise its right to carry out works on the boundary between the two sites as part of the development of its land. Similar notices were also served on the individual respondents.

8 The appellant appointed a surveyor (Mr Simon Levy) to act for it in connection with the party wall notices, and in a letter from its agent to the respondents dated 21 January 2011 it suggested that it would make sense for the respondents to appoint the same surveyor. The respondents do not appear to have followed this advice and those who chose to be represented appointed a different firm of surveyors, McBryer Beg.

9 The respondents' surveyor reached agreement with the surveyor acting for Freetown and they jointly published a party wall award under the 1996 Act on 5 May 2011. Agreement between the appellant's surveyor, Mr Levy, and the surveyor acting for Freetown proved more difficult. Before agreement was reached between them Freetown commenced works on its land, including trial excavation for new foundations adjoining the wall of the Building.

10 The appellant instructed solicitors (Greenwood & Co) who issued proceedings against Freetown in the Chancery Division of the High Court on 30 June 2011 seeking an injunction to prevent further work from taking place until agreement had been reached between the party wall surveyors. Greenwood & Co immediately applied for an interim injunction and at a hearing held on the day the proceedings were issued, and at which only the appellant was represented, Mr Justice Vos granted an injunction forbidding Freetown from continuing with works of construction within 6 metres of the boundary with the appellant's land for 7 days or until an award had been settled under the 1996 Act. The interim injunction was continued by further orders until 22 July 2011, when it was automatically discharged on the publication of an award under the Act which had eventually been settled by a third surveyor nominated by Mr Levy and Freetown's surveyor.

11 Despite the publication of the award the dispute between the appellant and Freetown continued. Freetown was dissatisfied with the award itself, and also maintained that it had been entitled to proceed with the work when it did and that therefore the injunction ought never to have been granted.

12 It was not until 13 March 2012 that the appellant applied to the High Court for permission to discontinue its claim under CPR r.38.2(2) . Where civil proceedings are discontinued the usual consequence is that the defendant is entitled to its costs, but the court may make a different order. In this case the appellant invited the court to order that the costs of the proceedings be paid by Freetown. Freetown resisted that application and made its own applications to enforce the cross-undertaking in damages given by the appellant on the grant of the interim injunction and to recover the costs of the proceedings from the appellant.

13 Those applications were tried before a Chancery Master over 3 days in April, July and August 2012. On 27 September 2012, Master Marsh delivered a judgment in which he held that the original injunction had been properly granted and that the appellant could withdraw its proceedings. The Master ordered that Freetown should pay the appellant's costs of the proceedings up to 30 November 2011, but ***255*** took the view that the application to discontinue ought to have been made earlier and that the appellant should pay Freetown's costs from 1 December 2011 to 13 March 2012. Freetown was ordered to pay the costs of the applications before the Master and was required to pay £40,000 on account pending a detailed assessment of those costs.

14 The appellant made it clear through its counsel, Mr Sissons, that any sums which it succeeds in recovering from Freetown will be credited to the service charge account for the benefit of the respondents in the year in which the sum is received.

15 Freetown also sought to challenge the party wall award made by the third surveyor by way of an appeal in the County Court which it commenced on 8 August 2011. Before the merits of the appeal could be considered a difficult procedural question arose, namely whether the appeal had been commenced within the permitted period of 14 day from service of the award. The appellant maintained that time started to run when the award was posted to the parties, and not when it was received. That submission succeeded in the County Court and on a first appeal in the High Court, but on 15 November 2012 the Court of Appeal allowed a second appeal by Freetown (*Freetown Ltd v Assethold Ltd [2012] EWCA Civ 1657*). The appellant was ordered to pay Freetown's costs of the three rounds of procedural appeals, as well as having to meet its own.

16 The costs of the County Court proceedings and the subsequent appeals are not directly in issue in this appeal. Nonetheless, the appellant has made it clear that if it succeeds in this appeal it intends to claim through the service charge both its own and Freetown's costs of those proceedings.

17 As part of the service charges for the year ending 31 December 2011 the appellant demanded from the respondents a contribution to the costs it had incurred in connection with the party wall award and in obtaining the injunction against Freetown. £4,188.90 was claimed for the fees of Mr Levy and a further £55,600.52 for the costs of Greenwood & Co. By way of comparison, the sums claimed in the same year for all other service charge items including insurance, cleaning and management totalled £16,391.

18 When the respondents objected to these costs the appellant applied to the LVT for a determination that the sums were payable under s.27A of the Landlord and Tenant Act 1985 .

The Lease

19 The standard form of lease used in the Building includes conventional service charge provisions which require the Landlord to perform or provide the Services listed in the First Schedule while obliging the Tenant to pay a Service Charge equal to an agreed percentage of the "Annual Expenditure".

20 The expression "Annual Expenditure" is defined in cl.1.3 of the Lease as comprising the following:

> "1.3.1 all costs expenses and outgoings whatever reasonably and properly incurred by the Landlord during the Financial Year in or incidental to providing all or any of the Services and
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> 1.3.2 all sums reasonably and properly incurred by the Landlord during a Financial Year in relation to the Additional Items and
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> 1.3.3 any VAT payable on such sums costs expenses and outgoings ***256**
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> but excluding any expenditure in respect of any part of the Development for which the Tenant or any other tenant is wholly responsible and excluding any expenditure that the Landlord recovers or that is met under any policy of insurance maintained by the Landlord pursuant to its obligations in this Lease"

21 The Services listed in the First Schedule include the following repairing obligation, at para.1:

> "To maintain and keep in good and substantial repair and condition and renew or replace when required the Main Structure the Common Parts and any Pipes used in common by the Tenant and other tenants of the Development and which are not expressly made the responsibility of the Tenant or any other tenant in the Development and the boundary walls and fences and all other parts of the Development and public area not included in the Lease of any flat in the Development."

22 The Services also included a more generalised obligation at para.6 of the First Schedule :

> "To do or cause to be done all works installations acts matters and things as in the reasonable discretion of the Landlord may be considered necessary or desirable for the proper maintenance safety amenity and administration of the Development."

23 By para.6 of the Second Schedule to the Lease the "Additional Items" which also form part of the Annual Expenditure include:

> "The proper fees and disbursements (and any VAT payable on them) of the Surveyor the Accountant and any other individual firm employed or retained by the Landlord for (or in connection with) such surveying or accounting functions or the management of the Development purposes of assessing the full cost of rebuilding and reinstatement and any individual firm providing caretaking or security arrangements and services to the Development" .

24 As can be seen, para.6 of the Second Schedule identifies two specific professionals whose fees may be included in the Annual Expenditure, namely, "the Surveyor" and "the Accountant". The expression "the Surveyor" is defined in cl.1.26 of the Lease to mean "any suitably qualified person or firm appointed by the Landlord to perform any of the functions of the Surveyor under this Lease …". Three "functions of the Surveyor" are referred to in the Lease; these relate to rent abatement in the event of damage by an insured risk (cl.5.4.3); the supervision of reinstatement (cl.5.6.5.1); and certification of the account showing Annual Expenditure (para.2, Third Schedule). The capitalised expression "the Accountant" is neither defined nor employed, as far as I have

been able to detect, elsewhere in the Lease.

25 Although this appeal concerns the recoverability of legal costs as part of the service charge, it is appropriate to note how the parties have dealt with such costs in other contexts elsewhere in the Lease. Two of the Tenant's covenants create a specific liability for legal costs.

26 Clause 3.19 is a Jervis v Harris [1996] Ch. 195 clause obliging the Tenant to undertake repairs required by a notice given by the Landlord, and entitling the Landlord to carry out the necessary works and recover the cost from the Tenant in ***257*** the event of a failure to comply with the notice. The sums payable by the Tenant in such circumstances include “all expenses incurred by the Landlord (including legal costs and surveyors' fees)”.

27 Clause 3.23 is a covenant by the Tenant to pay costs incurred by the Landlord in a variety of circumstances: in consequence of an application for a consent or licence under the Lease; in connection with the preparation and service of a s.146 notice or proceedings for forfeiture; in the recovery of arrears of rent; or in connection with the preparation of a schedule of dilapidations. In each of those eventualities the Tenant agrees to pay:

> “all costs fees charges disbursements and expenses (including without prejudice to the generality of the above those payable to counsel solicitors and surveyors) properly and reasonably incurred by the Landlord in relation to or contemplation of or incidental to [such matters]” .

28 Finally, the Lease includes a covenant by the Landlord, at cl.4.2, by which it agrees, at the written request of the Tenant, to enforce the covenants entered into by any other tenant in the Building. The Landlord's obligation is made conditional on the Tenant providing a deed of indemnity “in respect of all legal costs and other liabilities”.

The LVT's decision

29 In [35] of its decision the LVT accepted that the appellant's actions in responding to the party wall notices had been reasonable. The LVT was also satisfied that the quantum of the sums claimed was reasonable, although it would have made a deduction of £4,664.40 had it allowed the recovery of legal costs, because (as the Master had found) the application to discontinue the High Court proceedings ought properly to have been made earlier. There is no appeal against those determinations.

30 The LVT was satisfied that the fees of the appellant's party wall surveyor were recoverable both under para.6 of the First Schedule and under para.6 of the Second Schedule to the Lease.

31 The appellant relied on six different obligations under the Lease as entitling it to add the costs of its solicitors and counsel to the service charge, including paras 1 and 6 of the First Schedule and para.6 of the Second Schedule . The LVT concluded that none of these provisions was sufficient to entitle the appellant to recover the legal costs which it had incurred.

The proper approach to the construction of service charge covenants

32 In the respondents' statement of case for the appeal Mr Bates asserted that, as a general rule “service charge provisions are construed restrictively… In the event of ambiguity, the issue is resolved against the landlord”. In particular, he pleaded, legal costs were only recoverable as part of a service charge if “clear and unambiguous language” to that effect is employed in the lease. Support for these propositions was said to be provided by well known observations of the Court of Appeal in *McHale v Earl Cadogan [2010] 1 E.G.L.R. 51* (Rix LJ at [17]), in *Gilje v Charlegrove Securities [2002] 1 E.G.L.R. 41* (in the judgments of Laws LJ at [27]-[28] and Mummery LJ at [31]-[32]), and in *Sella House Ltd v Mears (1989) 21 H.L.R. 147; [1989] 12 E.G. 67* (Taylor LJ).

33 For the appellant Mr Sissons disputed the existence of any such general rule. ***258***

34 By the time of the hearing two very recent decisions of the Court of Appeal had enabled the

parties to reach a consensus on this aspect of the dispute. It is now clear from *Arnold v Britton [2013] EWCA Civ 902* and from *Francis v Philips [2014] EWCA Civ 1395* that there are no special rules of construction for service charges. Previous decisions which might have suggested that there were ought properly to be understood as examples of the application of universal principles of contractual interpretation.

35 *Arnold v Britton* concerned a service charge clause found in the standard form of lease employed on the letting of holiday chalets at a leisure development in Wales. The service charge did not vary in accordance with the costs of services but was initially a fixed amount of £90 for the first three years of the term and was then to rise "by ten pounds per hundred for every subsequent three year period" and in some cases by the same proportion for each subsequent year. The compounding effect of the annual or triennial 10 per cent increases caused the service charge to outstrip the cost of providing services and threatened to continue to do so. The County Court judge interpreted the leases by implying a cap on the service charge to prevent the landlord from making a profit. On appeal to the High Court this decision was reversed by Morgan J who gave literal effect to the language agreed between the parties despite the fact that this worked out very badly for the lessees. The lessees then appealed to the Court of Appeal.

36 The Court of Appeal received extensive submissions on the leading modern authorities on principles of contractual interpretation, including *Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 W.L.R. 896* ; *Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 A.C. 1101* ; *Attorney General of Belize v Belize Telecom [2009] 1 W.L.R. 1988* ; and *Rainy Sky SA v Kookmin Bank [2011] 1 W.L.R. 2900* . Giving the judgment of the Court Davis LJ declined to review this material, both because the applicable principles were well established and familiar and because "over-elaborate citation of such authorities carries with it a danger of obfuscating the task in hand: which is, ultimately, to interpret the words used, set in their context."

37 The Court of Appeal then consider and rejected a specific submission by Leading Counsel on behalf of the lessees that, as a matter of principle, service charge clauses were to be construed restrictively and should not be construed, in the absence of clear wording, so as to entitle the landlord to a profit over and above his actual outlay in providing the contracted services. At [37] Davis LJ (with whom Kitchen LJ and Richards LJ agreed) preferred the approach which had been taken to that submission in the High Court:

> "I agree, however, with Morgan J that a service charge clause in a lease is not subject to any special principle. Typically – at all events nowadays – a clause which is designed to be a service charge clause can be taken not normally to be intended to provide to a landlord a profit over and above the cost of the services provided (or, for that matter, a loss). Such a clause, if it potentially gives rise to such a result, therefore must be closely read to see if the wording requires such a conclusion. That is what Rix LJ was, as a matter of description, indicating: and that is simply a facet of the ordinary process of construction, having regard to the presumed commercial objective of such a clause used in ****259*** the particular case. But ultimately it all depends on the meaning of the language, set in context and having regard to the commercial purpose. As Morgan J put it in his judgment at paragraph 43:
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> 'I do not see why a service charge clause in a lease should be subject to a special principle… I consider that what is required is that the court must examine the wording of the charging provision, in its context and against all the admissible background and in the light of the apparent commercial purpose of the clause, and then decide what the provision means and how it operates.'"

The Court of Appeal therefore upheld the decision of Morgan J and concluded that the lease did not allow for a cap on the escalating service charge.

38 In *Francis v Philips [2014] EWCA Civ 1395* , the Court of Appeal's attention was directed mainly at the operation of ss.18 to 30 of the Landlord and Tenant Act 1985 ; the parties devoted less of their submissions to a subsidiary issue concerning the recovery of a management charge in addition to a wage paid to the lessors by a management company controlled by them. The management charge issue turned on the interpretation of a standard form of lease employed in the letting of holiday chalets on a park in Cornwall.

39 Although no reference was made in the judgments to *Arnold v Britton* the same approach was adopted: the ordinary rules of interpretation were to be applied, and little was to be gained by considering decisions dealing with different language. At [72]-[74] the Chancellor, Sir Terence Etherton, explained:

> "72. The starting point is that ordinary principles of contractual interpretation apply to the relevant provisions of the Lease. The meaning of a contract is that which a reasonable person who has all the background knowledge which would reasonably have been available to the parties to the contract in the situation in which they were at the time of the contract would have understood the parties to have meant. In deciding that meaning, the court must have regard to all the relevant circumstances: *Investors Compensation Scheme v West Bromwich Building Society [1988] 1 WLR 896* , 912–913 (Lord Hoffmann). The more unreasonable a particular interpretation the less likely the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear: *L Schuler AG v Wickman Machine Tool Sales Ltd [1974] AC 235* , 251 (Lord Reid). If there are two possible interpretations, that is to say a real ambiguity, the court is entitled to prefer that one which is consistent with business common sense and to reject the other: *Kookmin Bank v Rainy Sky SA [2011] UKSC 50, [2011] 1 WLR 2900* at [22] (Lord Clarke).
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> 73. As is apparent from those basic principles, even slight variations in the language of similar categories of lease provisions may result in a different meaning. There have been many cases on the interpretation of service charge provisions and some of them raise similar issues to the present case in terms of recovery of management charges. … It has not been suggested by counsel before us that the material provisions of the leases in those cases are absolutely identical to those in the present case and so there is no advantage in referring to them for a detailed comparison. ***260**
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> 74. On the other hand, the reported cases are generally consistent with a broad principle that it is reasonable to expect that, if the parties to a lease intend that the lessor shall be entitled to receive payment from the tenant in addition to the rent, that obligation and its extent will be clearly spelled out in the lease: see, for example, *Gilje v Charlgrove Securities Ltd [2002] 1 EGLR 41* at [31] (Mummery LJ). It is to be expected that the tenant will wish to be fully aware of any such additional obligation on which his or her continuing right to possess the land and to occupy it may depend. It is to be expected that the lessor will wish to make such a continuing additional obligation clear because it arises under a lease which will subsist through successive ownerships of the reversion and the tenancy and because the lessor will not wish to be out of pocket in respect of services provided for the benefit of the tenant … "

40 As Mr Bates pointed out, in [74] of his judgment the Chancellor cited *Gilje* as an example of the broad principle that one would expect payment obligations to be clearly spelled out. These are important provisions for both parties and, for the reasons given by the Chancellor, one would not expect either party to be content with ambiguity. Although these observations were introduced in terms suggestive of a contrast ("on the other hand") I do not read the Chancellor's statement of broad principle as a derogation from the ordinary principles of interpretation which he had already identified as the starting point, but rather as an application of those principles (and in particular the dicta of Lord Reid in *L Schuler AG v Wickman Machine Tool Sales Ltd* and Lord Clarke in *Kookmin Bank v Rainy Sky SA*).

41 Mr Sissons also relied on a number of decisions of the High Court and Court of Appeal in which expenditure on legal services had been recovered through a service charge in reliance on general words, despite the absence of any specific reference to legal costs or professional fees. In *Reston v Hudson [1990] 37 E.G. 86* the cost of obtaining a declaration that window frames were within the landlord's repairing obligation and that the cost of their replacement was a service charge expense was found to be recoverable as being within "all outgoings, costs and expenses whatsoever" reasonably incurred in the discharge of the landlord's repairing obligation, and more generally as costs of "management of the estate". In *Iperion Investment Corp v Broadwalk House Residents Ltd [1995] 2 E.G.L.R. 47* costs of proceedings to enforce a tenant's covenant against unauthorised alterations by injunction and forfeiture were found by the Court of Appeal to be within the expression "all costs properly incurred … in the proper and reasonable management

of" the building. These decisions establish no general principle and decisions of equal authority to the opposite effect can also be found (for example *St Mary's Mansions Ltd v Limegate Investment Co Ltd [2003] 1 E.G.L.R. 41*). The issue in this appeal does not turn on decisions on different contractual language in different leases, but on the exercise Morgan J described in *Arnold v Britton* of examining the wording of the charging provision, in its context and against all the admissible background and in the light of the apparent commercial purpose of the clause, and then deciding what it means and how it operates.

The appeal

42 For the appellant Mr Sissons' broad proposition was that the language of the Lease was sufficient to demonstrate an intention by the parties that the Landlord should be entitled to recover costs, including legal costs, incurred in taking ***261*** reasonable steps to protect both its own interests and those of the respondents when they were threatened by events such as Freetown's commencement of work on or close to the boundary without the security of a party wall award. He relied on two specific clauses in the First Schedule, paras 1 and 6 , both of which had to be read in light of the wide words in cl.1.3.1 ("all costs expenses and outgoings whatever reasonably and properly incurred by the Landlord during the Financial Year in or incidental to providing all or any of the Services"); he also relied on para.6 of the Second Schedule .

43 For the respondents Mr Bates submitted that none of the provisions relied on was sufficiently clear to justify the recovery of the disputed expenditure. The purpose of the proceedings taken by the appellant against Freetown had been to preserve its rights under the 1996 Act and, he submitted, it had been obvious that there had been no threat to the integrity of the Building itself (at least by the time the claim for an injunction was commenced). That could be seen both from the detailed judgment of Master Marsh and from the fact that the pleadings in the High Court claim did not include a claim for damages.

Paragraph 1, Schedule 1: "To maintain and keep in good and substantial repair and condition"

44 Mr Sissons submitted that it was not necessary that there first exist some element of disrepair in the structure of the Building before the appellant's obligation under para.1 of the First Schedule was engaged. "To maintain" meant something different from "to repair", since otherwise one or other expression would be wholly redundant. While "repair" connoted a process or activity involving the restoration to its original condition of something which had deteriorated from that condition, the verb "to maintain" described a result to be achieved, namely the preservation of the subject matter of the covenant in its original state. Maintenance therefore included preventative measures taken before any state of disrepair had developed.

45 A number of authorities on the meaning of the verb "to maintain" in different contexts were referred to by Mr Sissons (they are conveniently collected and discussed by Young J in Greetings Oxford Koala Hotel Pty Ltd v Oxford Square Investments Ltd (1989) 18 NSWLR 33 , 39). They supported his proposition that the word contemplates a result to be achieved rather than the means of achieving it. The word imports prevention rather than cure; for example, in *Hamilton v National Coal Board [1960] A.C. 633* , 647, Lord Keith of Avonholm said that the word "maintain" used in the Mines and Quarries Act 1954 "should be construed as meaning to keep in proper order by acts of maintenance before the thing to be maintained falls out of condition".

46 Mr Sissons went on to submit that where intrusive works on neighbouring property threatened to damage the subject matter of the covenant (including the foundations of the Building) it was apt to describe an application for an injunction to restrain that work and so to prevent the apprehended damage as incidental to, or within the scope of, the obligation "to maintain". It would be odd, he suggested, for the cost of preventing damage not to be recoverable under para.1 when, if the appellant had taken no steps to prevent the work and damage to the foundations of the Building had ensued, the cost of repairing that damage would undoubtedly be recoverable as costs of repair. ***262***

47 Moreover, Mr Sissons submitted, the evidence considered by the Master established that as part of its work Freetown had cut into the foundations of the Building to create "structural pockets" to facilitate the construction of its own foundations. The presence of these pockets amounted to disrepair and engaged the obligation in para.1.

48 While I accept Mr Sisson's general submission that “to maintain” and “to repair” connote different obligations, and that the former includes a duty to prevent the subject of the covenant from falling out of its original condition, I do not accept that the landlord's repairing obligation was engaged by the activity of Freetown. Nor do I accept that, assuming it to have been reasonably and properly incurred, the expenditure on litigation can be described as “costs expenses and outgoings whatever … in or incidental to providing” the service of maintaining and keeping the Building in good and substantial repair and condition.

49 To my mind, “to maintain” and “to repair” each connote the doing of something to the subject matter of the covenant. To repair involves undertaking work to restore the subject to a former condition from which it has deteriorated. To maintain involves preserving a functional condition by acts of maintenance performed on or to the thing to be maintained. In neither case is the expression apt to describe a process or activity remote from the thing to be repaired or maintained. I do not consider that one can properly speak of repairing or maintaining a building in good and substantial repair and condition by providing legal services at a distance, nor do I think that such services can be said to be incidental to repair or to maintaining that condition. I also suggest that, as a matter of ordinary language, the risk against which maintenance is directed is a risk of deterioration through use, rather than injury or damage caused by the exceptional activity of another.

50 It is also worth remembering that by cl.4.3 of the Lease the Landlord covenanted affirmatively to perform the obligations contained in the First Schedule . It would be surprising for a landlord to covenant in terms which positively obliged it to commence proceedings against a neighbouring owner, especially where individual lessees (with a more valuable interest to protect) are able individually or collectively to take action on their own behalf. It is noticeable that the “Additional Items” listed in the Second Schedule to the Lease, and which comprise expenditure on discretionary activities for which the Landlord is entitled to be reimbursed through the service charge if it chooses to undertake them, include (at para.13) the cost of abating a nuisance. No reliance was placed on that head of expenditure for the purpose of the appeal but it demonstrates that the draftsman did give some thought to the costs of preserving the Building from external threats, but did not make it a positive obligation of the Landlord.

51 For these reasons I consider that the LVT was correct in its conclusion that the legal expenses incurred in the High Court proceedings were not within para.1 of the First Schedule to the Lease.

Paragraph 6, Schedule 1: “all works installations acts matters and things as in the reasonable discretion of the Landlord may be considered necessary or desirable for the proper maintenance safety amenity and administration of the Development”

52 The LVT found that instructing a surveyor to respond to a party wall notice, which necessarily had the potential to affect the safety and amenity of the Building, was within the scope of para.6. It ruled out the recovery of the legal expenses which ****263*** followed in the wake of the notice on the grounds that the language of the covenant was too general. It referred to the guidance given by Taylor LJ in *Sella House Ltd v Mears* and considered that, in the absence of any specific mention of legal costs, the covenant did not permit their recovery.

53 Mr Sissons submitted that pursuing the litigation against Freetown was “an act matter or thing” which was “necessary or desirable for the proper maintenance safety amenity and administration of the Development”. The Master and the LVT had both accepted that the appellant had had reasonable grounds for concern at the time it commenced proceedings for an injunction and that it “had acted properly with the objective of ensuring that the structure of the building was not compromised and thus that its investment was not affected”. Although Mr Bates now suggested that there had never been any real risk of damage to the integrity of the Building, there was no cross-appeal against that important finding.

54 The distinction which the LVT drew between acts involving the assistance of a surveyor and acts involving the engagement of lawyers was not, Mr Sissons suggested, based on any rational or principled distinction. The LVT had read too much into *Sella House* , which established no general principle and turned on the nature of the legal expenditure sought to be recovered in that case (expenditure by the landlord in proceedings to recover rent and service charges from defaulting tenants). The Court of Appeal in *Iperion Corp v Broadwalk* had accepted that legal costs incurred in proceedings brought as part of the management of a building could be

recovered under a clause as general as paragraph 6.

55 The proper question was not whether specific, or “magic”, words appeared in the paragraph, but whether the costs in question had been incurred for the purposes mentioned in the paragraph. If the costs were incurred in connection with an act matter or thing done for one of those purposes (proper maintenance, safety, amenity and administration of the Building) the costs were recoverable.

56 Mr Bates described para.6 of the First Schedule as a “sweeping up clause” and submitted that no reasonable tenant would have understood that it might oblige them to indemnify the Landlord against costs incurred in a dispute with a third party. Such expenditure did not emerge clearly from the language of para.6. Litigating against a third party was not a “service” to the tenants and an imprecise and discretionary power given to the Landlord to incur expenditure on maintenance, safety, amenity and administration ought not to be interpreted as extending to litigation.

57 I am satisfied that although the words of para.6 are general, they are sufficient to encompass the Landlord taking professional advice prior to deciding what course of action to follow in order to preserve the safety and amenity of the Building. It is clear that the language is not limited to carrying out work to the Building itself, because the acts matters and things covered may include those for administration, as well as for safety, amenity and maintenance. The LVT thought that the engagement of a surveyor to advise on and respond to a party wall notice was within the language of the paragraph. I think they were right to do so, and Mr Bates has not suggested the contrary. Why then should taking and following the advice of a lawyer be excluded from the scope of the same provision? The activities within the scope of the paragraph are widely expressed, extending to “all works installations acts matters and things” for the specified purposes. Those purposes are also described in broad terms by reference to their general character. The answer ***264*** given by Mr Bates is that the language is insufficiently clear to demonstrate an intention to include expenditure on litigation.

58 I accept that, as a general principle of interpretation, if contracting parties intend that a payment obligation such as a service charge should cover a particular type of expenditure they will wish to make that clear. Unclear language should therefore be read as having a narrower rather than a wider effect. Nonetheless, I do not think that principle should be pushed to the point where language which was clearly intended to encompass expenditure in a wide variety of situations which the parties have not explicitly catalogued should be so restrictively construed as to deprive it of any real effect. It seems to me to be wrong in principle to start from the proposition that, with certain types of expenditure, including the cost of legal services, unless specific words are employed no amount of general language will be sufficient to demonstrate an intention to include that expenditure within the scope of a service charge. Language may be clear, even though it is not specific.

59 The First and Second Schedule s to the Lease specify a variety of activities the cost of which is to form part of the Annual Expenditure. The description of most of those activities is fairly precise, although not in all cases, yet the parties have clearly evinced an intention that expenditure by the Landlord falling within all of the listed categories, whether specific or general, should be recoverable through the service charge. A general provision such as para.6 is included in a lease precisely because the parties appreciate that they cannot anticipate all eventualities. The parties must be taken to expect that, in an agreement intended to last for 125 years, circumstances may arise which they do not specifically contemplate at the time of contracting and in which expenditure by the Landlord may be necessary or desirable in their mutual interests. The object of a provision such as cl.6 is to allow for the recovery of such expenditure through the service charge so long as it is for the proper maintenance, safety, amenity and administration of the Building.

60 I do not think that either *Sella House* or *Gilje* requires a different approach in principle to expenditure on legal advice and representation. *Sella House* concerned expenditure on proceedings brought against individual tenants to recover debts which they owed to the landlord, which the Court of Appeal did not regard as acts for the maintenance, safety and administration of the building. *Gilje* concerned the recovery of notional expenditure which had not been incurred. Nothing said in those cases about the need for clear and unambiguous language requires that language which is clear and of deliberately wide scope should be interpreted narrowly in the case of some categories of expenditure.

61 It is of course necessary to interpret specific provisions of the Lease in the light of the document as a whole. In particular it is necessary to consider the lengths to which the draftsman has gone in other places to stipulate that the Tenant will be liable to reimburse expenditure by the Landlord on legal advice and the cost of litigation. I refer in particular to the Tenant's covenants at cll.3.19 and 3.23 and the proviso to the landlord's covenant at cl.4.2.1 (see [26] to [28] above). Those covenants demonstrate that the draftsman was aware of the wisdom and importance of spelling out that reimbursement of Landlord's expenditure was intended in those specific circumstances to include legal costs. They might also suggest an appreciation that such costs may become substantial and, for that reason, highly contentious. Nonetheless they do not seem to me to dictate an exception for legal expenses from the very wide language of para.6 of the First Schedule . ***265**

62 I am satisfied that, though general, the language of para.6 of the First Schedule is sufficiently clear to entitle the appellant to recoup through the service charge the cost of engaging solicitors to take steps which in themselves are agreed to have been reasonable, to ensure that the protection afforded to the Building by a party wall award under the 1996 Act would not be lost. In my judgment those steps can appropriately be described as having been taken for the proper maintenance, safety, amenity and administration of the Building. There is nothing in the context or commercial purpose of the leases to suggest that the preservation of the Building from external interference ought not to be the responsibility of the Landlord. Indeed, the opposite is the case as the structure of the Building remains vested in the Landlord and the service charge puts it in a position to fund action for the common good which might be beyond the resources of individual tenants. The Lease also permits the recovery through the service charge of all sums reasonably and properly incurred in the abatement of a nuisance (para.13 of the Second Schedule) and, although that provision has not been specifically relied on by Mr Sissons, its inclusion in the Lease is consistent with the conclusion I have reached. That conclusion is that the cost of obtaining the injunction against Freetown is capable of being included as part of the Annual Expenditure recoverable through the service charge under para.6 of Sch.1 .

Paragraph 6, Second Schedule: "The proper fees and disbursements … of the Surveyor the Accountant and any other individual firm employed or retained by the Landlord for (or in connection with) such surveying or accounting functions or the management of the Development purposes of assessing the full cost of rebuilding and reinstatement and any individual firm providing caretaking or security arrangements and services to the Development"

63 The LVT found that the costs of the party wall surveyor were additionally capable of being recovered under para.6 of the Second Schedule to the Lease, but that solicitors' charges, which were not specifically referred to, were not. I think the LVT came to the right conclusion on this issue.

64 In contrast to para.6 of the First Schedule , the words now focussed on deal specifically with professional fees and disbursements. Such fees are recoverable under this provision first if they are incurred in connection with surveying functions, accounting functions or the management of the development. Something then seems to have gone wrong with the syntax, possibly by the omission of "and" or "or" before reference is made to assessing costs and providing caretaking or security arrangements and services to the Development.

65 The scope of these costs seems to me to be limited to the fees of surveyors and accountants, either those occupying the specific role of "the Surveyor" or "the Accountant" or "any other individual firm" performing the three functions identified. Those functions, surveying, accounting or management of the development, are not apt to encompass legal services, especially in a Lease where such services have been described in express terms elsewhere. I also read the final reference to "caretaking or security arrangements and services" as a composite expression covering caretaking arrangements and services and security arrangements and services, rather than referring to "services" in general. In any event I do not consider that litigation against a third party is properly regarded as a service. ***266**

Conclusion

66 For these reasons I consider that the LVT was wrong to determine that the appellant's

expenditure on legal costs in obtaining the injunction is not capable of forming part of the service charge. In my judgment these costs fell within para.6 of the First Schedule , although not within any other provision.

67 This conclusion is not determinative of the recoverability of service charge expenditure in any other year, nor does it necessarily mean that the cost of resisting Freetown's appeal against the party wall award (by which time there was no longer any threat to the Building) are recoverable. The only sum to which this decision relates is the sum of £50,936.12 reasonably incurred in respect of Greenwood & Co's fees and disbursements during the service charge year ending 31 December 2011.

68 The LVT declined to make an order under s.20C, Landlord and Tenant Act 1985 and there has been no cross-appeal against that aspect of its decision. In his written submissions Mr Bates suggested that in the event that there is any issue under s.20C in connection with costs incurred in relation to the appeal, it could best be resolved on the basis of short written submissions once the outcome of the appeal was known. It may be that no such issue will now arise but if either party wishes to make any further application in that regard they should do so within 14 days.

Appeal allowed.

Appendix

Respondents to the appeal

Flat 1 – Mr N M Watts

Flat 2 – Mr M R P Rondon

Flat 4 – Ms A Irwin

Flat 5 – Mr C Weston

Flat 6 – Mr M J Rogers

Flat 7 – Mrs C D Masullo

Flat 8 – Mr H Yuan

Flat 9 – Mr G Buchucchio

Flat 10 – Mr S Wallage

Flat 11 – Mr A R Pasley

Flat 12 – Ms N Gilbert & Mr M Knezevic

Flat 13 – Ms E S Hartwell & Ms K E Lees

Flat 14 – Mr Raggatt, Ms A L Chatelais & Ms E Jardin ***267**